

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX

SFUND RECORDS CTR
86019

IN THE MATTER OF:)	
Southbay Asbestos Superfund Site)	
)	DOCKET NO. 2000-07
)	
UNDER THE AUTHORITY OF THE)	AGREEMENT AND COVENANT
COMPREHENSIVE ENVIRONMENTAL)	NOT TO SUE
RESPONSE, COMPENSATION, AND)	WCSJ LLC
LIABILITY ACT OF 1980, 42 U.S.C.)	
§ 9601, <u>et seq.</u> , as amended.)	

I. INTRODUCTION

This Agreement and Covenant Not to Sue ("Agreement") is made and entered into by and between the United States on behalf of the Environmental Protection Agency ("EPA") and WCSJ LLC, a Delaware limited liability company ("Settling Respondent"). The United States and Settling Respondent are collectively referred herein as the "Parties."

This Agreement is entered into pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9601, et seq. and the authority of the Attorney General of the United States to compromise and settle claims of the United States.

WCSJ, a limited liability company with its headquarters at 4000 East 3rd Avenue, 6th Floor, Foster City, California 94404-1167, has proposed to buy property located on Gold Street, adjacent to the Guadalupe River, North of Highway 237, in the City of San Jose, California as described in Exhibit 1 of this Agreement ("the Property"). The Property consists of approximately 68 acres of land and is located within the area encompassed by the Southbay Asbestos Superfund Site ("the Site").

The Parties agree to undertake all actions required by the terms and conditions of this Agreement. The purpose of this Agreement is to settle and resolve, subject to reservations and limitations contained herein, the potential liability of Settling Respondent for Existing

Contamination at the Property that would otherwise result from Settling Respondent becoming the owner and operator of the Property.

The Parties agree that Settling Respondent's entry into this Agreement, and the actions undertaken by Settling Respondent in accordance with the Agreement, do not constitute an admission of any liability by Settling Respondent.

The resolution of this potential liability, in exchange for provision by Settling Respondent to EPA of a substantial benefit, is in the public interest.

II. DEFINITIONS

Unless otherwise expressly provided herein, terms used in this Agreement that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations, including any amendments thereto.

1. "DTSC" shall mean the State of California's Department of Toxic Substances Control.
2. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.
3. "Existing Contamination" shall mean:
 - a. any hazardous substances, pollutants or contaminants present or existing on or under the Property as of the effective date of this Agreement;
 - b. any hazardous substances, pollutants or contaminants that migrated from the Property prior to the effective date of this Agreement; and
 - c. any hazardous substances, pollutants or contaminants presently at the Site that migrate onto or under or from the Property after the effective date of this Agreement.
4. "Parties" shall mean the United States on behalf of EPA and Settling Respondent.

5. "Property" shall mean that portion of the Site, encompassing approximately 68 acres, which is described in Exhibit 1 of this Agreement.

6. "Settling Respondent" shall mean WCSJ LLC.

7. "Site" shall mean the Southbay Asbestos Superfund Site (Superfund Site 09-R1), in the district of Alviso, City of San Jose, County of Santa Clara, State of California, which is depicted generally on the map attached as Exhibit 2. The Site includes the Property and all areas where hazardous substances and/or pollutants or contaminants have come to be located.

8. "The State" shall mean the State of California, its departments, agencies, and instrumentalities.

9. "United States" shall mean the United States of America, its departments, agencies, and instrumentalities.

III. STATEMENT OF FACTS

10. WCSJ was formed for the purpose of purchasing and developing the Property.

11. WCSJ is the buyer in a Purchase and Sale Agreement for the Property located within the Site.

12. The former landfill portion of the Property, otherwise known as the Highway 237 Disposal Site, has not been used for commercial purposes since 1982 when it stopped accepting waste. The remainder of the Property was last used for commercial purposes in 1992.

13. Settling Respondent represents, and for the purposes of this Agreement EPA relies on those representations, as follows:

- a. Settling Respondent wishes to purchase and redevelop approximately 45 acres of the Property for office, retail, light industrial, service commercial and restaurant uses, to encumber the Property with mortgages and deeds of trust (securing loans to fund the purchase, construction and development), and to lease, sell

and/or otherwise use and enjoy the Property and return the Property to productive use.

- b. Settling Respondent intends to construct numerous structures on the Property including office buildings and an aboveground parking garage.
- c. Settling Respondent's use of the Property is expected to expand the local tax base and create jobs for the local community.
- d. Approximately 23 acres, located in the northern area of the property, are designated as open space and Settling Respondent will preserve and maintain that acreage as open space.
- e. Settling Respondent's involvement with the Property has been limited to soil and groundwater investigations at the Property, performed by Settling Respondent's consultant, Lowney Associates, in 1998. Settling Respondent has provided EPA with a summary of all information obtained from such investigations.
- f. Settling Respondent is not, and has never been, named as a potentially responsible party under CERCLA at the Site.
- g. Settling Respondent does not now and has never owned or operated any portion of the Property. In September 1997, affiliates of Settling Respondent (Lincoln Property Company No. 2233 Limited Partnership and its general partner Lincoln Property Development Company N.C., Inc., and WIX/NJS Real Estate Limited Partnership) purchased and began development of certain parcels within the Site that were the subject of two Prospective Purchaser Agreements in Region 9, Docket Nos. 97-14 (Western Parcel) and

97-15 (Eastern Parcel). In August 1999, affiliates of Settling Respondent (Legacy Partners 2335 LLC and WCSJ LLC) purchased another parcel within the Site that was the subject of a third Prospective Purchaser Agreement with Region 9, Docket No. 99-10.

IV. PAYMENT

14. In consideration of and in exchange for the United States' Covenant Not to Sue in Section IX herein, Settling Respondent agrees to pay to EPA the sum of two hundred fifty thousand dollars (\$250,000), within 30 days of the effective date of this Agreement. Settling Respondent shall make the payment required by this Agreement in the form of a certified check made payable to "U.S. EPA Hazardous Substance Superfund," referencing EPA Region IX, EPA Docket number 2000-07, EPA Site Number 09-R1, DOJ case number 90-11-2-353/5, and name and address of Settling Respondent. Payment shall be sent to:

U.S. EPA Region IX
Attn: Superfund Accounting
P.O. Box 360863M
Pittsburgh, PA 15251

Notice of payment (including a copy of the check and transmittal letter) shall be sent to those persons listed in Section XVI (Notices and Submissions) and to:

Catherine Shen
Financial Management Specialist (PMD-6)
U.S. EPA Region IX
75 Hawthorne Street
San Francisco, California 94105

Section Chief
Environmental Enforcement Section
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611
Attn: DJ #90-11-2-353/5 (Wise)

15. Amounts due and owing pursuant to the terms of this Agreement but not paid in accordance with the terms of this Agreement shall accrue interest at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), compounded on an annual basis.

V. WORK TO BE PERFORMED

16. Settling Respondent agrees to install a proper cap over the former landfill area of the Property, as set forth in the Soil Management Plan contained within the Postclosure Land Use Proposal as approved by the Regional Water Quality Control Board. The Soil Management Plan is attached as Exhibit 3 to this Agreement. Settling Respondent agrees to maintain in perpetuity the integrity of such cap, except Settling Respondent may replace such cap with a protective cover of equal or greater quality (the original cap and any replacement cap are hereinafter collectively referred to as "the cap"). Settling Respondent shall take all reasonable steps to maintain the cap so that it is protective of human health and the environment and effective in preventing releases of asbestos. Settling Respondent further agrees to:

- a. inspect the cap at least every five years to determine whether it has any cracks, holes or damage that would render it ineffective to prevent the release of asbestos, or for any reason is no longer effective, or may become ineffective, in preventing asbestos releases;
- b. submit to the State of California's Department of Toxic Substances Control ("DTSC") a statement describing any material cracks, holes, damage that would render the cap ineffective to prevent the release of asbestos, and other problems and indicating what repairs, if any, are needed to maintain the integrity of the cap; and
- c. perform all such repairs to the satisfaction of DTSC.

17. Settling Respondent shall not perform any construction or excavation activities on the Property or any other activity that might disturb the cap or lead to a release of asbestos except

in compliance with the Soil Management Plan as approved by the Regional Water Quality Control Board.

18. Settling Respondent shall preserve and maintain the approximately 23 acres of land located in the northern area of the property as open space.

VI. ACCESS/NOTICE TO SUCCESSORS IN INTEREST

19. Commencing upon the date that it acquires title to the Property, Settling Respondent agrees to provide to EPA, its authorized officers, employees, representatives, and all other persons performing response actions under EPA or State oversight, an irrevocable right of access at all reasonable times to the Property and to any other property to which access is required for the implementation of response actions at the Site, to the extent access to such other property is controlled by Settling Respondent, for the purposes of performing and overseeing response actions at the Site under federal or state law. EPA agrees to provide reasonable notice to Settling Respondent of the timing of response actions to be undertaken at the Property. Notwithstanding any other provision of this Agreement (except for Paragraph 24), EPA retains all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, ("RCRA") et. seq., and any other applicable statute or regulation, including any amendments thereto.

20. With respect to any property owned or controlled by Settling Respondent that is located within the Site, within 15 days after the effective date of this Agreement or the date of acquisition of any property, whichever date is later, (to the extent it has not already done so) Settling Respondent shall submit to EPA for review and approval a notice to be filed with the Recorder's Office, Santa Clara County, State of California, which shall provide notice to all successors-in-title that the property is subject to this Agreement. Settling Respondent shall record

the notice within 10 days of EPA's approval of the notice. Settling Respondent shall provide EPA with a certified copy of the recorded notice within 10 days of recording such notice.

21. Settling Respondent shall ensure that transferees, assignees, successors in interest, lessees, and sublessees of all or any portion of the Property shall provide the same access and cooperation required in Paragraph 19. Settling Respondent shall ensure that a copy of this Agreement is provided to any current lessee or sublessee on the Property as of the effective date of this Agreement and shall ensure that any subsequent leases, subleases, assignments or transfers of the Property or an interest in the Property are consistent with this Section, Section V (Work to be Performed), and Section XII (Parties Bound/Transfer of Covenant).

VII. DUE CARE/COOPERATION

22. Settling Respondent shall exercise due care at the Property with respect to the Existing Contamination and shall comply with all applicable local, state, and federal laws and regulations. Settling Respondent recognizes that the implementation of response actions at the Site may interfere with Settling Respondent's use of the Property, and may require closure of its operations or a part thereof. Settling Respondent agrees to cooperate fully with EPA in the implementation of response actions at the Site and further agrees not to interfere with such response actions. EPA agrees, consistent with its responsibilities under applicable law, to use reasonable efforts to minimize any interference with Settling Respondent's operations by such entry and response. In the event Settling Respondent becomes aware of any action or occurrence that causes or threatens a release of hazardous substances, pollutants or contaminants at or from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Settling Respondent shall immediately take all appropriate actions to prevent, abate, or minimize such release or threat of release, and shall, in addition to complying with any applicable notification requirements under Section 103 of CERCLA, 42 U.S.C. § 9603, or any other law, immediately notify EPA of such release or threatened release.

VIII. CERTIFICATION

23. By entering into this agreement, Settling Respondent certifies that to the best of its knowledge and belief it has fully and accurately disclosed to EPA all information known to Settling Respondent and all information in the possession or control of its officers, directors, employees, contractors and agents that relate in any way to any Existing Contamination or any past or potential future release of hazardous substances, pollutants or contaminants at or from the Site, except for information recorded in documents that are, on the effective date of this Agreement, in the possession of EPA Region 9. Settling Respondent also certifies that to the best of its knowledge and belief it has not caused or contributed to a release or threat of release of hazardous substances or pollutants or contaminants at the Site. If the United States determines that information provided by Settling Respondent is not materially accurate and complete, the Agreement, within the reasonable discretion of the United States, shall be null and void and the United States reserves all rights it may have.

IX. UNITED STATES' COVENANT NOT TO SUE

24. Subject to the Reservation of Rights in Section X of this Agreement, upon payment of the \$250,000 specified in Section IV (Payment) of this Agreement, the United States covenants not to sue or take any other civil or administrative action against Settling Respondent for any and all civil liability for injunctive relief or reimbursement of response costs pursuant to Sections 106 or 107(a) of CERCLA, 42 U.S.C. §§ 9606 or 9607(a) with respect to the Existing Contamination. If Settling Respondent fails to preserve and maintain the approximately 23 acres of land located in the northern area of the property as open space as set forth in Section V (Work to Be Performed), this Agreement, including the United States' Covenant Not to Sue will be null and void with regard to those acres only.

X. RESERVATION OF RIGHTS

25. The covenant not to sue set forth in Section IX above does not pertain to any matters other than those expressly specified in Section IX (United States' Covenant Not to Sue). The United States reserves and the Agreement is without prejudice to all rights against Settling Respondent with respect to all other matters, including but not limited to, the following:

- a. claims based on a failure by Settling Respondent to meet a requirement of this Agreement, including but not limited to Section IV (Payment), Section V (Work to Be Performed), Section VI (Access/Notice to Successors in Interest), Section VII (Due Care/Cooperation), Section XV (Payment of Costs);
- b. any liability resulting from past or future releases of hazardous substances, pollutants or contaminants, at or from the Site caused or contributed to by Settling Respondent, its lessees or sublessees;
- c. any liability resulting from exacerbation by Settling Respondent, its lessees or sublessees, of Existing Contamination;
- d. any liability resulting from the release or threat of release of hazardous substances, pollutants or contaminants, at the Site after the effective date of this Agreement, not within the definition of Existing Contamination;
- e. criminal liability;
- f. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessment incurred by federal agencies other than EPA; and
- g. liability for violations of local, state or federal law or regulations.

26. With respect to any claim or cause of action asserted by the United States, Settling Respondent shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to Existing Contamination.

27. Nothing in this Agreement is intended as a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States may have against any person, firm, corporation or other entity not a party to this Agreement.

28. Nothing in this Agreement is intended to limit the right of EPA or the State to undertake future response actions at the Site or to seek to compel parties other than Settling Respondent to perform or pay for response actions at the Site. Nothing in this Agreement shall in any way restrict or limit the nature or scope of response actions that may be taken or be required by EPA or the State in exercising its authority under federal or state law. Settling Respondent acknowledges that it is purchasing Property where response actions may be required.

XI. SETTLING RESPONDENT'S COVENANT NOT TO SUE

29. In consideration of the United States' Covenant Not to Sue in Section IX of this Agreement, Settling Respondent hereby covenants not to sue and not to assert any claims or causes of action against the United States, its authorized officers, employees, or representatives with respect to the Site or this Agreement (except as provided in Paragraph 30), including but not limited to any direct or indirect claims for reimbursement from the Hazardous Substance Superfund established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507, through CERCLA Sections 106(b)(2), 111, 112, 113, or any other provision of law, any claim against the United States, including any department, agency or instrumentality of the United States, under CERCLA Sections 107 or 113 related to the Site, or any claims arising out of response activities at the Site, including claims based on EPA's oversight of such activities or approval of plans for such activities.

30. Settling Respondent reserves, and this Agreement is without prejudice to, Settling Respondent's right to bring actions against the United States:

- a. to seek specific performance of the terms of this Agreement; provided that Settling Respondent shall have no right to seek and shall not seek in any such action damages, punitive damages, penalties, reimbursement of costs, interest; and,
- b. based on negligent actions taken directly by the United States, not including oversight or approval of Settling Respondent's plans or activities, that are brought pursuant to any statute other than CERCLA or RCRA and for which the waiver of sovereign immunity is found in a statute other than CERCLA or RCRA.

Nothing herein shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

XII. PARTIES BOUND/TRANSFER OF COVENANT

31. This Agreement shall apply to and be binding upon the United States, Settling Respondent, and its officers, directors, and employees. The United States' Covenant Not to Sue in Section IX and Contribution Protection in Section XIX shall apply to Settling Respondent's officers, directors, or employees, to the extent that the alleged liability of the officer, director, or employee is based on its status and in its capacity as an officer, director, or employee of Settling Respondent, and not to the extent that the alleged liability arose independently of the alleged liability of Settling Respondent. Each signatory of a Party to this Agreement represents that he or she is fully authorized to enter into the terms and conditions of this Agreement and to legally bind such Party.

32. Settling Respondent may assign or transfer the Property without prior approval of EPA. No transferee or assignee (collectively, "transferee") of all or any portion of the Property

shall have any right hereunder (including any right under the United States' Covenant Not to Sue in Section IX) unless:

- a. before such assignment or transfer, the transferee shall consent in writing to be bound by and perform, from the date of transfer, all of the obligations and terms set forth in Paragraphs 16-22, 25-29, and 37-40 of this Agreement as though it were Settling Respondent;
- b. the transferee shall be financially capable of performing all such obligations;
- c. the transferee is not liable under CERCLA or any other law for the Existing Contamination;
- d. the transferee's use of the Property will not result in a release or threat of release of any hazardous substance;
- e. the transferee's use of the Property will not cause or contribute to the migration or release of any Existing Contamination or to any threat to human health caused by any such release or threat of release;
- f. at least 30 days before such assignment or transfer, the transferee shall have submitted to EPA:
 - (1) a written notice, as set forth in Exhibit 4 to this Agreement, describing the proposed assignment or transfer and identifying the property to be transferred and the transferee and
 - (2) an affidavit and supporting documentation demonstrating to EPA's reasonable satisfaction the truth of the preceding clauses b. through e. of this Paragraph 32;

- g. Settling Respondent shall have fully performed its obligations under Section IV (Payment); and
- h. EPA shall not have objected to transferee's notice, affidavit and supporting documentation. In the event that EPA has not so objected within thirty (30) days of its receipt of written notice from the transferee, such assignment or transfer shall be deemed approved. Any objection by EPA to any assignment or transfer pursuant to this clause h. shall be reasonable.

33. Settling Respondent may lease the Property or any portion thereof to tenants who, in turn, may lease to sub-tenants (collectively "Tenants") without prior approval of EPA. No Tenant shall have any right hereunder (including any right under the United States' Covenant Not to Sue in Section IX and Contribution Protection in Section XIX) unless Tenant has provided to EPA:

- a. a written notice, as set forth in Exhibit 5 to this Agreement, providing an accurate description of Tenant, including the Tenant's name, date of and parties to the lease or sublease; description and address of the leased premises; and certifying that:
 - (1) Tenant is not liable under CERCLA or any other law for Existing Contamination;
 - (2) Tenant's use of the Property will not result in the release or threat of release of a hazardous substance;
 - (3) Tenant's use of the Property will not contribute to any threat to human health caused by any such release or threat of release;
 - (4) Tenant will provide access to the Property at reasonable times and upon reasonable notice to Settling Respondent and EPA, as set forth in Paragraph 19 of this Agreement;

- (5) Tenant has reviewed this Agreement and any modifications and notices hereto, and will not act inconsistently with its terms; and
- (6) the person signing the notice on behalf of Tenant warrants that he or she is authorized to make the forgoing certification on behalf of Tenant.

- b. an affidavit and supporting documentation demonstrating to EPA's reasonable satisfaction the truth of the preceding clauses a. (1) through (6) of this Paragraph 33.

Upon submitting such notice and supporting documentation to EPA, such Tenant shall have the benefit of Section IX (United States' Covenant Not to Sue) and Section XIX (Contribution Protection) with respect to the leased property from the date of delivery of such notice, subject to EPA's subsequent objection. EPA's objection to Tenant's certification, affidavit and supporting documentation must be reasonable and must be made within thirty (30) days of its receipt of Tenant's notice. However, if at any time, EPA determines that the certifications provided pursuant to this Paragraph, are materially inaccurate or incomplete, the United States' Covenant Not to Sue and Contribution Protection shall be null and void with respect to the Tenant, and the United States reserves all rights it may have against the Tenant. Assignees of a Tenant's interest in the Property shall have the rights of the Tenant hereunder, provided that such Assignees comply with the provisions of clauses a. and b. of this Paragraph 33.

34. If all conditions of Paragraph 32 have been met, and if EPA has not objected within 30 days as set forth in Paragraph 32, upon the transfer or assignment of the Property:

- a. Settling Respondent shall be released from the obligations set forth in Paragraphs 16, 18, 19, 21 (except for the first sentence of Paragraph 21), and 22 of this Agreement for that portion of the Property transferred or assigned to an approved transferee;

- b. Settling Respondent shall continue to enjoy the benefits of Section IX (United States' Covenant Not to Sue) and Section XIX (Contribution Protection); and
- c. EPA shall be released from its obligations to Settling Respondent (but not to transferee) under Paragraphs 19 and 22 for that portion of the Property transferred or assigned to an approved transferee.
- d. Settling Respondent shall not be released from any other obligations set forth in this Agreement, including those in Paragraphs 14, 29 and Section XV (Payment of Costs), except as EPA and Settling Respondent agree in writing.

35. With respect to transfers of the United States' Covenant Not to Sue under Section IX, Settling Respondent shall not be released from any obligations under this Agreement upon transferring the Agreement to Tenants.

36. Settling Respondent agrees to pay the reasonable costs incurred by EPA to review any requests for consent to assign or transfer the Property.

XIII. DISCLAIMER

37. This Agreement in no way constitutes a finding by EPA as to the risks to human health and the environment that may be posed by contamination at the Property or the Site nor constitutes any representation by EPA that the Property or the Site is fit for any particular purpose.

XIV. DOCUMENT RETENTION

38. Settling Respondent agrees to retain and make available to EPA and the State all business and operating records, contracts, Site studies and investigations, and documents relating to operations at the Property, except financial records, for at least ten years following the effective date of this Agreement unless otherwise agreed to in writing by the Parties. At the end of ten

years, Settling Respondent shall notify EPA of the location of such documents and shall provide EPA with an opportunity to copy any documents at the expense of EPA.

XV. PAYMENT OF COSTS

39. If Settling Respondent fails to comply with the terms of this Agreement, including, but not limited to, the provisions of Section IV (Payment), Section V (Work to be Performed), or Section VI (Access/Notice to Successors in Interest) of this Agreement, it shall be liable for all litigation and other enforcement costs incurred by the United States to enforce this Agreement or otherwise obtain compliance.

XVI. NOTICES AND SUBMISSIONS

40. All notices to Settling Respondent should be sent to:

Edgar M. Thrift, Jr.
WCSJ LLC
4000 East 3rd Avenue, 6th Floor
Foster City, California 94404-1167

All notices to the United States should be sent to:

Regional Counsel
U.S. EPA
75 Hawthorne Street
San Francisco, California 94105
Attn: EPA Docket # 2000-07

with a copy to:

Eric Yunker
Superfund Project Manager
U.S. EPA
75 Hawthorne Street
San Francisco, California 94105

All notices to the State should be sent to:

Barbara Cook, Chief, Site Mitigation Branch
Department of Toxic Substances Control
700 Heinz Avenue
Berkeley, California 94710.

Any party may change the name or address to which it receives notices by delivering written notice to the parties named herein.

XVII. EFFECTIVE DATE

41. If the Regional Administrator and the Assistant Attorney General approve this Agreement prior to the date Settling Respondent takes title of the Property, and EPA does not withdraw or modify its consent to this Agreement after reviewing public comments, then the effective date of this Agreement shall be the date upon which Settling Respondent takes title of the Property. If the Regional Administrator or the Assistant Attorney General does not execute this Agreement, or if EPA withdraws or modifies its consent to this Agreement after reviewing public comments, or Settling Respondent takes title of the Property prior to the date the Regional Administrator and the Assistant Attorney General approve this Agreement, then there is no Agreement and no effective date.

XVIII. TERMINATION

42. If any Party believes that any or all of the obligations under Section VI (Access/Notice to Successors in Interest) are no longer necessary to ensure compliance with the requirements of the Agreement, that Party may request in writing that the other Party agree to terminate the provision(s) establishing such obligations; provided, however, that the provision(s) in question shall continue in force unless and until the party requesting such termination receives written agreement from the other party to terminate such provision(s).

XIX. CONTRIBUTION PROTECTION

43. With regard to claims for contribution against Settling Respondent, the Parties hereto agree that Settling Respondent is entitled to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) for matters addressed in this Agreement. The matters addressed in this Agreement are Settling Respondent's liability arising from its ownership of the Property, and all response actions taken or to be taken and response

costs incurred or to be incurred by the United States or any other person with respect to Existing Contamination.

44. Settling Respondent agrees that with respect to any suit or claim it brings for contribution for matters related to this Agreement, it will notify the United States in writing no later than 60 days prior to the initiation of such suit or claim.

45. Settling Respondent also agrees that with respect to any suit or claim for contribution brought against them for matters related to this Agreement, it will notify in writing the United States within 10 days of service of the complaint on them.

XX. EXHIBITS

46. Exhibit 1 shall mean the description of the Property that is the subject of this Agreement.

47. Exhibit 2 shall mean the map depicting the Site.

48. Exhibit 3 shall mean the Soil Management Plan contained within the Postclosure Land Use Proposal (EMCON February 2000).

49. Exhibit 4 shall mean the form certification letter, "Certification of Compliance With Agreement and Covenant Not to Sue (Assignees)."

50. Exhibit 5 shall mean the form certification letter, "Certification of Compliance With Agreement and Covenant Not to Sue (Tenant)."

XXI. PUBLIC COMMENT

52. This Agreement shall be subject to a thirty-day public comment period, after which EPA may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations that indicate this Agreement is inappropriate, improper or inadequate.

IT IS SO AGREED:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION IX

BY:

Keith A. Takata —
Keith A. Takata
Director, Superfund Division

5-5-00
Date


IT IS SO AGREED:

WCSJ LLC

A Delaware Limited Liability Company

BY: 

Barry DiRaimondo
Title: Vice President




April 20, 2000

Date


IT IS SO AGREED:

UNITED STATES DEPARTMENT OF JUSTICE

BY:



Lois J. Schiffer
Assistant Attorney General
Environment and Natural Resources Division



Date

Exhibit 1

LEGAL DESCRIPTION OF PROPERTY

OPTION PARCEL

ALL THAT CERTAIN REAL PROPERTY SITUATE IN THE CITY OF SAN JOSE, COUNTY OF SANTA CLARA, STATE OF CALIFORNIA AND BEING A PORTION OF THAT CERTAIN PARCEL DESCRIBED IN THE ALVISO SALT COMPANY DECREE QUIETING TITLE NO. 38,406, FILED MAY 8, 1931 AND RECORDED IN BOOK 589 OF OFFICIAL RECORDS OF SANTA CLARA COUNTY, PAGE 126, AND BEING A PORTION OF THAT CERTAIN 67.289+/- ACRE PARCEL OF LAND SHOWN ON THAT CERTAIN RECORD OF SURVEY ENTITLED "RECORD OF SURVEY, A PORTION OF THE LANDS OF LESLIE SALT CO. BEING PORTIONS OF SECTIONS 9 AND 16 T.8.S. R.1 .W. M.D.M. AND THE ULISTAC RANCHO WITHIN THE CITY OF SAN JOSE, AND THE UNINCORPORATED AREA OF SANTA CLARA COUNTY, CALIFORNIA", WHICH MAP WAS FILED FOR RECORD IN THE OFFICE OF THE RECORDER OF THE COUNTY OF SANTA CLARA, STATE OF CALIFORNIA ON DECEMBER 22, 1988 IN BOOK 594 OF MAPS AT PAGE 39, AN BEING A PORTION OF THAT CERTAIN REAL PROPERTY DESIGNATED PARCELS 1, 2, 3, 4, AND 5 AS SHOWN ON THE RECORD OF SURVEY OF A PORTION OF THE ULTISTAC RANCHO, WHICH MAP WAS FILED FOR RECORD OCTOBER 28, 1977 IN THE OFFICE OF THE RECORDER OF SANTA CLARA COUNTY IN BOOK 406 OF MAPS, PAGE 37, DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT DISTANT NORTH 1°06'50" EAST 286.06 FEET FROM A STAKE MARKED "CS1" AT THE SOUTHEAST CORNER OF THAT CERTAIN PARCEL OF REAL PROPERTY DESCRIBED IN THE ALVISO SALT COMPANY QUIET DECREE NO.38406 RECORDED MAY 8, 1931 IN BOOK 589 OF OFFICIAL RECORDS OF SANTA CLARA COUNTY, AT PAGE 126; THENCE NORTH 1°06'50" EAST 531.65 FEET, MORE OR LESS TO THE SOUTHERLY CORNER OF LANDS NOW OR FORMERLY OWNED BY E. H. RENZEL JR. AND WERNER STERN AND DESCRIBED IN THE DEED FROM LESLIE SALT CO. TO RENZEL, ET AL, RECORDED IN VOLUME 4180 OF SAID OFFICIAL RECORDS, AT PAGE 86, THENCE ALONG THE LINE COMMON TO LESLIE SALT CO., AND RENZEL, ET AL, SAID LINE BEING ALSO THE EASTERLY LINE OF A RAILROAD RIGHT OF WAY NORTHWESTERLY ON A CURVE TO THE RIGHT FROM TANGENT WHICH BEARS NORTH 31°08' 52" WEST WITH A RADIUS OF 1408.92 FEET, THROUGH A CENTRAL ANGLE OF 14°37'30" FOR A DISTANCE OF 359.12 FEET; THENCE LEAVING SAID LINE OF SAID RIGHT OF WAY, NORTH 58°40' 02" EAST 179.02 TO THE POINT OF INTERSECTION OF THE SOUTHWESTERLY LINE OF THE SANTA CLARA-ALVISO ROAD, AS IT EXISTED IN 1955, WITH AN EASTERLY LINE OF THAT CERTAIN PARCEL OF LAND DESCRIBED IN LAST SAID DECREE, THENCE LEAVING THE LINE COMMON TO THE LANDS OF LESLIE SALT CO., AND RENZEL, ET AL, AND ALONG THE EASTERLY LINE OF THE LANDS OF LESLIE SALT FORMERLY OF ALVISO SALT COMPANY, AS DESCRIBED IN SAID LAST MENTIONED DECREE, NORTH 30°08'28" WEST 100.85 FEET; THENCE LEAVING SAID LINE OF SAID ROAD NORTH 80°03'10" WEST, 7.34 FEET; THENCE RUNNING WESTERLY ALONG THE SOUTHERLY LINE OF THE LANDS OF BAY SHELL COMPANY, AS DESCRIBED IN THE DEED FROM LESLIE SALT CO., TO BAY SHELL COMPANY RECORDED IN BOOK 462 OF SAID OFFICIAL RECORDS, AT PAGE 530, SOUTH 61° 30' 25" WEST 140.88 FEET THE

EAST LINE OF THE RIGHT OF WAY FORMERLY OF SOUTHERN PACIFIC COAST RAILROAD, 50 FEET WIDE, THENCE ALONG EAST LINE NORTHERLY ON A CURVE TO THE RIGHT FROM A TANGENT THAT BEARS NORTH 11°43'07" WEST, WITH A RADIUS OF 1408.92 FEET, THROUGH A CENTRAL ANGLE OF 3°47' 27", FOR AN ARC DISTANCE OF 93.08 FEET, THENCE SOUTH 80°13'15" EAST 3.34 FEET TO THE SOUTHEAST CORNER OF THAT CERTAIN 0.268 ACRE PARCEL OF LAND DESIGNATED AND SHOWN AS PARCEL 5 ON THAT CERTAIN MAP ENTITLED, "RECORD OF SURVEY OF A PORTION OF THE ULISTAC RANCHO LYING WITHIN THE CITY OF SAN JOSE, COUNTY OF SANTA CLARA, CALIFORNIA, FOR MARSHLAND DEVELOPMENTS, INC." WHICH MAP WAS FILED FOR RECORD IN THE OFFICE OF THE RECORDER OF THE COUNTY OF SANTA CLARA, STATE OF CALIFORNIA ON AUGUST 11, 1983 IN BOOK 649 OF MAPS AT PAGE 20; THENCE ALONG THE EASTERLY LINE OF SAID PARCEL 5, NORTHERLY ON A CURVE TO THE RIGHT ON A TANGENT THAT BEARS NORTH 8°08'57" WEST WITH A RADIUS OF 1949.81 THROUGH A CENTRAL ANGLE OF 1°07'43" FOR AN ARC DISTANCE OF 38.41 FEET; THENCE CONTINUING ALONG SAID EASTERLY LINE OF SAID PARCEL 5, NORTH 7°01'22" WEST, 107.07 FEET; THENCE NORTH 2°17'07" WEST, 89.21 FEET TO A POINT IN THE GENERAL SOUTHERLY LINE OF THAT CERTAIN PARCEL OF LAND CONVEYED TO THE STATE OF CALIFORNIA IN THE BOUNDARY LINE AND SETTLEMENT AGREEMENT, RECORDED FEBRUARY 16, 1989 IN BOOK K850 OF OFFICIAL RECORDS OF SAID COUNTY, PAGE 1676; THENCE ALONG SAID GENERAL SOUTHERLY LINE, NORTH 73°19'05" WEST, 46.94 FEET TO THE EASTERLY LINE OF THAT CERTAIN 1.702 ACRE PARCEL OF LAND DESIGNATED AND SHOWN AS PARCEL 3 ON SAID RECORD OF SURVEY; THENCE ALONG SAID EASTERLY LINE AND CONTINUING ALONG SAID GENERAL SOUTHERLY LINE, NORTH 0°03'03" EAST, 41.00 FEET TO A POINT IN SAID EASTERLY LINE OF SAID PARCEL 3 BEING DISTANT 21.00 FEET SOUTHERLY ALONG SAID EASTERLY LINE FROM THE NORTHEASTERLY CORNER THEREOF; THENCE LEAVING SAID EASTERLY LINE, CONTINUING ALONG SAID GENERAL SOUTHERLY LINE THE FOLLOWING TEN (10) COURSES;

1. NORTH 85°08'40" WEST, 89.45 FEET
2. NORTH 73°03'54" WEST, 137.49 FEET
3. NORTH 70°24'12" WEST, 64.21 FEET
4. NORTH 74°38'02" WEST, 32.14 FEET
5. NORTH 79°22'21" WEST, 70.70 FEET
6. NORTH 82°57'03" WEST, 98.23 FEET
7. NORTH 81°34'05" WEST, 75.31 FEET
8. NORTH 73°21'37" WEST, 59.48 FEET
9. NORTH 70°37'22" WEST, 49.81 FEET

10. NORTH 54°13'55" WEST, 27.00 FEET TO A POINT ON THE NORTHERLY LINE OF THAT CERTAIN 2.508 ACRE PARCEL OF LAND DESIGNATED AND SHOWN ON SAID RECORD OF SURVEY AS PARCEL 1, DISTANT THEREON, SOUTH 82°18'40" EAST, 68.50 FEET FROM THE NORTHWEST CORNER THEREOF;

THENCE LEAVING SAID GENERAL SOUTHERLY LINE, ALONG SAID NORTHERLY LINE NORTH 82°18'40" WEST, 68.50 TO SAID NORTHWEST CORNER, SAID NORTHWEST CORNER BEING A POINT IN THE GENERAL EASTERLY LINE OF THE LANDS OF LESLIE SALT CO., FORMERLY OF ALVISO SALT COMPANY, AS DESCRIBED IN SAID MENTIONED DECREE; THENCE RUNNING NORTHERLY ALONG THE GENERAL EASTERLY LINE, NORTH 24°33'10" WEST, 76.58 FEET TO A 4" X 4" POST MARKED "CS 3"; THENCE NORTH 10°03'50" EAST, 33.95 FEET; THENCE LEAVING SAID GENERAL EASTERLY LINE, NORTH 87°37'30" WEST, 214.83 FEET;

THENCE SOUTH 0°15'04" EAST, 261.90 FEET;

THENCE SOUTH 5°57'10" EAST, 174.00 FEET;

THENCE SOUTH 0°38'40" WEST, 431.48 FEET;

THENCE SOUTHERLY AND SOUTHWESTERLY ALONG THE ARC OF A 175.00 FOOT RADIUS TANGENT CURVE TO THE RIGHT THROUGH A CENTRAL ANGLE OF 63°05'09", AN ARC DISTANCE OF 192.68 FEET;

THENCE SOUTH 63°43'50" WEST, 574.58 FEET;

THENCE NORTH 87°26'31" WEST, 147.00 FEET;

THENCE SOUTH 60°10'15" WEST, 277.00 FEET;

THENCE SOUTH 66°36'05" WEST, 185.90 FEET;

THENCE SOUTH 66°18'20" WEST, 183.70 FEET;

THENCE SOUTH 22°15'06" EAST, 94.76 FEET TO AN ANGLE POINT IN THE NORTH LINE OF THAT CERTAIN PARCEL OF REAL PROPERTY DESCRIBED IN THE DEED FROM LESLIE SALT CO TO SANTA CLARA COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT, RECORDED DECEMBER 10, 1963 IN BOOK 8304 OF OFFICIAL RECORDS OF SANTA CLARA COUNTY AT PAGE 1; THENCE ALONG SAID NORTH LINE SOUTH 89°18'11" EAST 1559.99 FEET TO THE NORTHEAST CORNER OF SAID PARCEL; THENCE ALONG THE EAST LINE OF SAID PARCEL SOUTH 1°53'32" WEST 250.04 FEET TO THE SOUTHEAST CORNER THEREOF; THENCE SOUTH 89°18'11" EAST 0.68 FEET; THENCE SOUTH 1°53'30" WEST 684.88 FEET; THENCE SOUTH 10°04'25" EAST, 58.57 FEET TO THE NORTHWEST LINE OF THE SOUTH BAY FREEWAY STATE ROUTE 237 DESCRIBED IN THAT CERTAIN FINAL ORDER OF CONDEMNATION ENTERED ON NOVEMBER 13, 1957 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SANTA CLARA IN THAT CERTAIN ACTION ENTITLED, "THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF VS. WILLIAM CURTIS SWABEY, ET AL, DEFENDANTS", CASE NO.100136, A CERTIFIED COPY OF

WHICH ORDER WAS FILED FOR RECORD IN THE OFFICE OF THE RECORDER OF THE COUNTY OF SANTA CLARA, STATE OF CALIFORNIA ON NOVEMBER 13, 1957 IN BOOK 3935 OFFICIAL RECORDS, PAGE 432: THENCE ALONG SAID LINE NORTH 58°51'44" EAST 1083.85 FEET; THENCE CONTINUING ALONG SAID LINE NORTH 56°05'14" EAST 317.33 FEET TO THE EASTERLY CORNER OF THAT CERTAIN 10.873 ACRE PARCEL DESCRIBED IN THE DEED DATED NOVEMBER 12, 1963 TO LESLIE SALT CO., A DELAWARE CORPORATION RECORDED DECEMBER 16, 1963 IN BOOK 6311, PAGE 16, SANTA CLARA COUNTY RECORDS; THENCE ALONG THE NORTHEASTERLY LINE OF SAID PARCEL NORTH 33°54'46" WEST 348.75 FEET TO THE POINT OF BEGINNING.

CONTAINING 67.406 ACRES, MORE OR LESS.

THE BEARINGS USED IN THE ABOVE DESCRIPTION ARE BASED UPON THE CALIFORNIA COORDINATE SYSTEM, ZONE 3 (CCS27, ZONE 3). ALL DISTANCES ARE GRID DISTANCES IN FEET. TO OBTAIN GROUND DISTANCES, MULTIPLY THE GRID DISTANCE BY 1.000555.

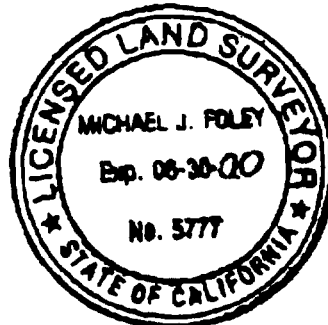
THIS REAL PROPERTY DESCRIPTION HAS BEEN PREPARED BY ME, OR UNDER MY DIRECTION, IN CONFORMANCE WITH THE PROFESSIONAL LAND SURVEYOR'S ACT, AND SHALL NOT BE UTILIZED IN ANY CONVEYANCE WHICH MAY VIOLATE THE SUBDIVISION MAP ACT OF THE STATE OF CALIFORNIA OR LOCAL ORDINANCES.

EXECUTED THIS 157 DAY OF MAY, 1998

KIER & WRIGHT CIVIL ENGINEERS & SURVEYORS, INC.

Michael J. Foley

MICHAEL J. FOLEY
PROFESSIONAL LAND SURVEYOR
STATE OF CALIFORNIA
NUMBER 5777 *06/30/00*
LICENSE EXPIRES: ~~03/30/00~~



END OF WRITTEN DESCRIPTION

Exhibit 2

MAP OF SOUTHBAY ASBESTOS SUPERFUND SITE

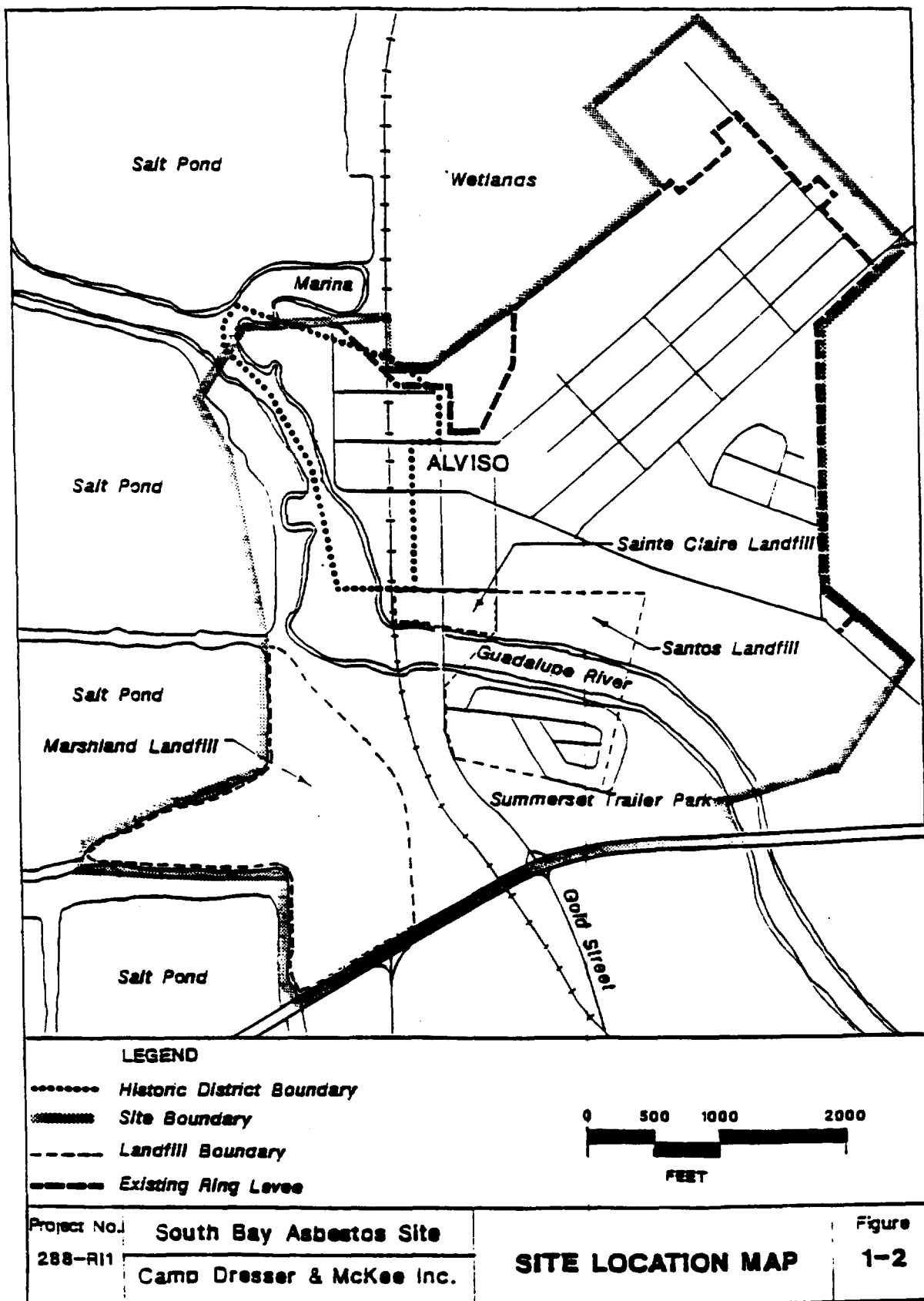


Exhibit 3

SOIL MANAGEMENT PLAN (EMCON JULY 1999)

Exhibit 4

**CERTIFICATION OF COMPLIANCE
WITH AGREEMENT AND COVENANT NOT TO SUE (TRANSFEREES)**

CERTIFIED MAIL
Regional Counsel
U.S. Environmental Protection Agency
75 Hawthorne Street
San Francisco, California 94105

**Re: Certification of Compliance with Agreement and Covenant Not to Sue,
 Docket No.2000-07; Southbay Asbestos Superfund Site**

In accordance with Section XII (Parties Bound/Transfer of Covenant) of the Agreement and Covenant Not to Sue, Docket No. 2000-07 ("Agreement"), the undersigned assignee or transferee (collectively "Transferee") hereby notifies the U.S. Environmental Protection Agency ("EPA") that it acquired title to all or a portion of the Property (as defined in the Agreement). The Agreement was originally entered into by and between EPA and WCSJ LLC, and concerns the real property described in Exhibit 1 (the "Property"). A legal description of the acquired property is attached hereto. The Agreement, including the Covenant Not to Sue and Contribution Protection, will be applicable only as to the property to which Transferee acquired title.

[Insert a paragraph that describes the Transferee and identifies the parties to the sale.]

Transferee acknowledges that it has reviewed the Agreement and any modifications and notices thereto. Pursuant to Section XII of the Agreement (Parties Bound/Transfer of Covenant), Transferee hereby agrees it is a Settling Respondent and shall be bound by and perform, from the date of acquiring title to the Property, all of the obligations and terms in the Agreement in effect on the date it takes title to the Property, and Transferee hereby certifies that:

1. Transferee has not caused or contributed to the release or threat of release of any amount of the Existing Contamination;
2. Transferee's use and ownership of the Property shall not result in a release or threat of release of a hazardous substance;
3. Transferee shall not use or allow to be used the portion of the Property that is the subject of purchase in any manner that could cause or contribute to the migration or release of any Existing Contamination;
4. Transferee shall permit access to the portion of the Property which is the subject of the purchase as set forth in Paragraph 19 of the Agreement;

5. Transferee shall exercise due care at the Site and cooperate with EPA as set forth in Section VII of the Agreement;
6. Transferee shall not interfere with response actions taken on or around the Property;
7. Transferee is financially capable of performing all of its obligations as a Settling Respondent pursuant to the Agreement; and
8. the person signing this Notice on behalf of Transferee hereby certifies, represents and warrants that he or she is authorized to make these certifications on behalf of the Transferee.

An affidavit and supporting documentation demonstrating the truthfulness of the preceding clauses 1-8 is attached.

Upon submission of this letter to EPA, Transferee shall have all of the rights and obligations under the Agreement and Covenant Not to Sue as of the date it takes title to the Property. However, if at any time EPA determines that Transferee's certification is materially inaccurate or incomplete, the Agreement and Covenant Not to Sue shall be null and void with respect to Transferee, and the United States reserves all rights it may have against Transferee.

Transferee agrees that any assignments or transfers of the Agreement by Transferee shall be in accordance with the provisions set forth in the Agreement.

Notices and submissions required under the Agreement shall be sent to the following contact persons for Transferee:

[INSERT CONTACT INFORMATION]

So acknowledged and agreed:
[Insert Transferee's Name]

Name and Title

Address & Telephone Number

Date

cc: Superfund Division Director
U.S. EPA, Region IX

Superfund Records Center
U.S. EPA Region IX

Exhibit 5

**CERTIFICATION OF COMPLIANCE
WITH AGREEMENT AND COVENANT NOT TO SUE (TENANTS)**

CERTIFIED MAIL

Regional Counsel

U.S. Environmental Protection Agency

75 Hawthorne Street

San Francisco, California 94105

Re: Certification of Compliance with Agreement and Covenant Not to Sue, Docket No. 2000-07; Southbay Asbestos Superfund Site

In accordance with Section XII (Parties Bound/Transfer of Covenant) of the Agreement and Covenant Not to Sue, Docket No. 2000-07 ("Agreement"), the undersigned tenant or subtenant (collectively "Tenant") hereby notifies the U.S. Environmental Protection Agency ("EPA") that it leased a portion of the Property (as defined in the Agreement). The Agreement was originally entered into by and between EPA and WCSJ LLC, and concerns the real property described in Exhibit 1 (the "Property"). A legal description of the leased property is attached hereto. The Covenant Not to Sue and Contribution Protection will be applicable only as to the property leased by the Tenant. The effective date of the lease is _____.

[Insert a paragraph that describes the Tenant and identifies the parties to the lease.]

Tenant acknowledges that it has reviewed the Agreement and any modifications and notices thereto. Pursuant to Section XII of the Agreement (Parties Bound/Transfer of Covenant), Tenant hereby agrees and certifies that:

1. Tenant has not caused or contributed to the release or threat of release of any amount of the Existing Contamination;
2. Tenant shall not, over the course of any 12 month period, generate, use or store, without the express written consent of EPA (such consent not to be unreasonably withheld), any hazardous substance or extremely hazardous substance, as defined in 42 U.S.C. §§ 9601(14), 11002(a), in an amount equal to or exceeding its reportable quantity as established by 42 U.S.C. §§ 9602(a), 11002(a), at the portion of the Property which is the subject of the lease or sublease;
3. Tenant's use of the Property shall not result in a release or threat of release of a hazardous substance;
4. Tenant shall not use the portion of the Property which is the subject of the lease or sublease in any manner that could cause or contribute to the migration or release of any Existing Contamination;

5. Tenant shall permit access to the portion of the Property which is the subject of the lease or sublease as set forth in Paragraph 19 of the Agreement;
6. Tenant shall exercise due care at the Site and cooperate with EPA as set forth in Section VII of the Agreement;
7. Tenant shall not interfere with response actions taken on or around the Property;
8. Tenant shall be bound by and subject to the terms and obligations of the Agreement, shall act consistent with the terms of the Agreement, and is financially capable of performing all such obligations; and
9. the person signing this Notice on behalf of Tenant hereby certifies, represents and warrants that he or she is authorized to make these certifications on behalf of the Tenant.

An affidavit and supporting documentation demonstrating the truthfulness of the preceding clauses 1-9 is attached.

Upon submission of this letter to EPA, Tenant shall have the rights and benefits set forth in Sections IX (United States' Covenant Not to Sue) and XIX (Contribution Protection) of the Agreement with respect to the portion of the Property that is the subject of the lease or sublease. However, if at any time EPA determines that Tenant's certification is materially inaccurate or incomplete, the Covenant Not to Sue and Contribution Protection shall be null and void with respect to Tenant, and the United States reserves all rights it may have against Tenant.

Notices and submissions required under this Agreement that effect Tenant's interest in the Property shall be sent to the following contact persons for Tenant:

[INSERT CONTACT INFORMATION]

So acknowledged and agreed:

[Insert Tenant's Name]

Name and Title

Address & Telephone Number

Date

cc: Superfund Division Director
U.S. EPA, Region IX

Superfund Records Center
U.S. EPA Region IX